

BACKGROUND ON IBEW REQUEST

On March 13, 1990, IBEW Local 1245 requested an exemption from 10 CFR Part 26 random drug testing requirements for members of IBEW Local 1245 at Diablo Canyon, based on factors such as the safety record of Diablo Canyon, and the lack of evidence of drug use or alcohol abuse by employees. Subsequently, IBEW withdrew the request to exempt reactor operators from random drug testing.

On October 2, 1990, the NRC denied this request and IBEW Local 1245 filed a petition for judicial review. On June 11, 1992, the Ninth Circuit Court of Appeals denied the petition for review in *IBEW, Local 1245 v. NRC*, 966 F.2d 521 (9th Cir. 1992). The court stated that although random drug testing may well be impermissible for clerical workers at Diablo Canyon who perform no safety-related work and have no access to vital areas (VAs), IBEW Local 1245 had not established that such a group existed (in the record before the court at that time). The court also indicated that it would be predisposed to reversing an NRC decision to deny a future exemption request that was limited to clerical workers that did not perform safety-related work.

In a staff requirements memorandum (SRM) dated August 18, 1992 (COMSECY-92-018), the Commission directed the staff to examine the justification for imposing random drug testing on workers with no direct safety functions, particularly for clerks, secretaries, or other employees who have unrestricted access to a nuclear plant's protected area (PA) but whose own jobs are not directly safety-related. The Commission also instructed the staff to consider the impact of such testing on licensees, including the legal and economic impact considerations of changes in the scope of established Fitness-for-Duty (FFD) testing programs.

On January 26, 1993, IBEW Local 1245 filed a modified exemption request specifically asking that the NRC exempt from random drug testing clerical employees at Diablo Canyon who are members of Local 1245 of the IBEW and who have unescorted access to the PA only, but not to the VAs of the plant, do not have access to the radiologically controlled areas (RCAs), and who are not required to staff the plant's emergency response center (ERC). IBEW supplemented this request by letter dated December 6, 1993, incorporating by reference the record in support of its earlier exemption request. The letter also noted the licensee's plans to implement substantial changes in its security system at Diablo Canyon in early 1994. IBEW stated that the licensee planned to expand the boundaries of the VAs and control entry by card-keyed turnstile rather than card-keyed doors. According to IBEW, these changes would further limit access to the VAs by preventing personnel from "tailgating" through the card-keyed doors. On January 27, 1994, at the staff's request, the Office of the General Counsel advised the IBEW that the exemption request would be held in abeyance pending a Commission decision in response to COMSECY-92-018.

Pursuant to COMSECY-92-018, the staff evaluated the scope of random drug testing at power reactors required by 10 CFR Part 26, and considered the impact of implementing any of four possible alternatives to the scope of Part 26 requirements. SECY-94-016, dated January 24, 1994, reported the results of the staff's analysis to the Commission.

On May 11, 1994, the staff published the results of its review of these options in the *Federal Register* (59 FR 24373) to solicit public comment. The staff received 34 letters of comment from the following sources: 20 letters from licensees, 5 from the IBEW, 1 from the Nuclear Energy Institute, 4 from members of the general public, 2 from State government offices, 1 from

a vendor, and 1 from the Ohio Citizens for Responsible Energy. The comments generally favored retaining the current scope of testing. Comments received from licensees, State government offices, public citizens groups, vendors and the NEI support the staff's view that the risk or vulnerability to nuclear power plants will increase if the scope of random drug and alcohol testing is reduced. IBEW's comments reflected its view that the risk or vulnerability will be unchanged if the current random drug and alcohol testing scope is modified to include only workers who have unescorted access to the VAs or RCAs or who staff ERCs. IBEW also believed that changing the current scope of random drug testing posed no increased risk to the plant from any act, whether inadvertent or deliberate, and thus would not increase the possibility of nuclear accidents or the risk of sabotage or vandalism.

In SECY-00-0022, "Rulemaking Plan, 'Decrease in the Scope of Random Fitness-for-Duty Testing Requirements for Nuclear Power Reactor Licensees,' for Amendments to 10 CFR Part 26," February 1, 2000, the staff proposed to initiate rulemaking to reduce the scope of random drug and alcohol testing at nuclear power plants. In the rulemaking plan, the staff recommended requiring random testing at nuclear power plants only for those personnel who have unescorted access to VAs. This proposal would mean that random testing could be discontinued for personnel who have unescorted access to the PA only, including personnel required to physically report to the technical support center (TSC) or emergency operating facility (EOF) if these facilities were outside the VA. Pre-access testing and for-cause testing would continue to apply to all personnel who have unescorted access to the PA or are required to report physically to the TSC or EOF. Since this proposed change would relax the required scope of random testing, the staff stated in the rulemaking plan that it would reduce regulatory burden. However, the legal analysis in the rulemaking plan cautioned against relying upon burden reduction as a rationale for changing the scope of random testing because licensees appeared to be satisfied with the current scope and did not support any of the options for changing it.

In an SRM dated April 24, 2000, the Commission approved the staff's recommendation to initiate rulemaking to amend the required scope of random drug and alcohol testing as discussed in SECY-00-0022. The Commission also directed the staff to seek detailed comment on this matter and, as the rulemaking proceeded, undertake a careful analysis of the balance of public and private interests. In particular, the SRM directed the staff to carefully assess the risks associated with unescorted access to PAs if the scope of random drug testing is changed, in light of the fact that some safety-significant equipment may be found in the PAs, but outside of the VAs. In the same SRM, the Commission disapproved the staff's recommendation to grant the renewed IBEW petition. The Commission stated that the underlying rulemaking issues should be resolved before a decision on the exemption request.

At a March 22, 2001, public workshop where the proposed reduction in scope was discussed, the staff received information indicating that the preferred option might be more burdensome than anticipated. Industry representatives indicated that the change would create a need to track each change in the VA access list and translate it into a corresponding change in the random testing pool. For example, a maintenance technician who seldom works in the VA would typically be removed from the VA access list (but not the PA access list) as part of regular purging to minimize unneeded access to the VA. Then, when the technician needed VA access again, the technician would be added back to the VA access list. Under the proposed change, each occasion would require a corresponding change to the random testing pool. In addition, a draft regulatory analysis indicated a net increase in cost as a result of the reduction in scope.

On September 24, 2002, the staff updated the IBEW on the status of its exemption request stating the NRC had decided to address it in the larger revision to Part 26.